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Supreme Court of the United States

OCTOBER TERM 1968

No. 1088

THE OFFSHORE COMPANY,
Petitioner,

– against –

G. & H. OFFSHORE TOWING CO., INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

Opinion of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ADMIRALTY No. 64-H-88

THE OFFSHORE COMPANY, as Owner of
DRILL BARGE RIG 58,

Libellant,

vs.

G & H OFFSHORE TOWING CO., INC.
and the TUG JUNO,

Respondent.

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(Mr. Robert M. Julian),
Houston, Texas,
Attorneys for Libellant.

Royston, Rayzor & Cook
(Mr. M. L. Cook),
Houston, Texas,
Attorneys for Respondent.

June 10, 1966

The libel is one to recover for damages suffered by the Drilling Barge 58 on or about January 17, 1964, while she was in tow of the Tug JUNO in the Gulf of Mexico. By cross-

libel, the respondent, as owner of the tug, seeks to recover a portion of the towing charges, which admittedly has been withheld by the libellant; certain additional or "detention" charges by reason of delay resulting from deviation from course for repairs to the 58, and attorneys' fees.

The contract of towage is in writing, and I refer thereto for a detailed statement of its terms. Briefly, it provided that the JUNO would pick up Barge 58 at Beacon No. 7, off the coast of Morgan City, Louisiana, and tow her to Breighton, Trinidad for a fixed sum. It further provided that if the tow put in to port during the voyage for repairs or alterations to the tow, or because of any other reason for which the tow might be responsible, additional compensation at a fixed daily rate was to be paid. A further provision was to the effect that the respondent "shall have the benefit of all exemptions from, and limitations of, liability to which an owner of a vessel is entitled under the Limitation of Liability Statutes of the United States and that they shall have all of the rights, immunities, and exemptions that are accorded to a ship and to a carrier under Title 46 U.S.C.A., Section 1304 (Carriage of Goods by Sea Act).[1]

Drilling Barge 58 is owned by the libellant, The Offshore Company. She is an all-welded steel barge built in 1960. She is approximately 100 feet long and 80 feet wide. Her hull is of ½ inch steel plate. Immediately prior to the voyage she was carefully inspected and surveyed, and was found to be in good order and seaworthy in every respect. She and her sister ships previously had been towed without incident to practically all of the offshore oil producing areas of the world.

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[1] The Carriage of Goods by Sea Act provides, in part (Section 1304), that the vessel shall not be liable for "(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the managment of the ship;".

The Tug JUNO is owned by the respondent and cross-libellant. She is a seagoing tug of 197 gross tons, 100 feet in length, 27 feet in width, and with a draft of 12 feet 8 inches. At the time in question, she was in regular service of this nature, with crew, power, and equipment sufficient to accomplish this towage routinely.

The JUNO took the unmanned Barge 58 in tow at the assigned spot at 3:00 p.m., January 9, 1964, on a 1600 ft. towing cable, and the voyage began. Within the next few days, the flotilla encountered rough and very rough seas. Both vessels rolled heavily. However, nothing untoward occurred during this interval with the tow. On January 10, the JUNO lost all radio contact with marine operators ashore, and on or about January 12 the LORAN set became inoperative. The evidence does not suggest that either of these resulted from the weather conditions. The loss of radio contact is noted in the log and this continued until the radio was repaired January 20.[2] The loss of the LORAN is not noted in the log. Thus, by reason of cloudly and overcast weather which prevented their sighting on the celestial bodies, the officers of the tug were able to fix their locations thereafter only by dead reckoning estimate until about noon of January 18. As hereinafter noted, these estimates were grievously in error and such error was a vital consideration in later decisions.

Shortly after daylight of January 17, the Captain of the JUNO noted that the Barge "seemed to be going down by the head". A log entry at noon of that date was to the effect that "58 had settled by the head app. 3 ft.". At this time both tug and tow were rolling in very rough seas. The Captain reduced speed slightly. As she was out of radio contact and unable to secure instructions, and as the navi-

[2] The Captain put in three hours of overtime repairing the radio. He found two loose wires and repaired them.

gator fixed the JUNO's location by dead reckoning at a point almost through the Yucatan Straits (where the flotilla would have been confronted with a strong adverse current), the Captain felt the wiser course was to proceed. The JUNO held her course. As high a speed was maintained as weather conditions, and safety to the towing cable, permitted.

Between noon and 3:00 p.m. of January 18, a number of important developments took place. The Barge was noted to be down by the head some four to five feet. As the weather had moderated somewhat, speed was increased. Weather also permitted a closer inspection of the Barge, and the tug reversed for this purpose. It was found that she was down to such an extent that her deck was awash. At about this time the weather cleared sufficiently for the officers of the JUNO to determine her correct position. They found — to their surprise — that she had made much less headway than supposed, and rather than being some 90 miles to the southeast of Cape San Antonio (being the western tip of Cuba) and having passed through the Straits of Yucatan, in fact she was some 60 miles to the northwest of the Cape and was only approaching the Straits. Hence, being some 150 miles farther from his destination than he had thought, the Captain of the JUNO changed course for Key West, Florida (thus securing the benefit of a favoring two knot current) as a port of refuge. From that point forward, the weather abated and the remainder of the voyage to Key West was uneventful. No member of the JUNO crew was put aboard the 58, nor was she pumped out, during this interval. She arrived at Key West the evening of January 21 with her bow under water, but still afloat.

Repairs were made in Key West. It was found that Barge 58 had suffered rather widespread damage at various spots completely across her forward end. The steel plating had been dented and punctured, and her welded seams split

open. There were five holes which from the pictures in evidence appear to vary in size from a split perhaps 2 inches wide to a puncture about the size and shape of a football. Sea water had not only entered her hull, but had done extensive damage to the electrical wiring and equipment within her deck housing. The damage had obviously been inflicted by some heavy object or objects which had come in violent contact with the hull during the towage. There is no evidence whatsoever as to precisely what caused the damage. The crew of the JUNO have testified that they have no knowledge of the cause. The Barge, as stated, was unmanned.

The libellant has suggested that the tug may have backed down upon the tow. The crew of the JUNO deny this, and there is no evidence that any damage was apparent to the tug. The Captain of the JUNO suggests contact with partially submerged floating objects such as logs or debris may have caused the damage. Not only did he testify to having seen a number of such partly submerged objects on January 16 (the day before the list was detected), but made an entry in the log book under that date to this effect. I do not credit this testimony. From its location in the log book and from the reservations which I entertain with respect to other testimony of the JUNO's captain,[3] I am of the

[3] As an illustration of my doubts as to the testimony of Captain Ives, I cite the following. It should be borne in mind that the captain (Ives) and the second officer-navigator (Williams) both have testified that during the morning of January 18, and no later than noon of that date, actual sightings on the sun showed the true position of the flotilla, and that this fact was an important consideration in their change of course for Key West. This position showed that the vessel was not in or near the Yucatan Straits and had never been.

The log book notation of 2:55 p.m. of January 18 made by the captain reads in part as follows: "Rig down by head so deep that cannot make any headway against current in Yucatan Straits." Proctor for respondent suggests that this

view that this entry was inserted long after January 16th, with an eye to the trial and the need for an explanation of the damage.

The evidence as recited above is without dispute. An abstract statement of the applicable law also seems to be clear. But it does not follow that decision of the case is a simple task. In my judgment, the question is very close.

The respondent relies on *Stevens* v. *The White City,* 285 U.S. 195 (1932), and the cases which follow this authority, such as *Stall & McDermott* v. *The Southern Cross,* 196 F.2d 309 (5th Cir. 1952); *New Orleans Coal, etc.* v. *U.S.,* 86 F.2d 53 (5th Cir. 1936); *South, Inc.* v. *Moran Towing & Trans. Co.,* 252 F.Supp. 500 (S.D.N.Y. 1965), affirmed by the Second Circuit in an as yet unpublished opinion, *South Inc.* v. *Moran Towing Co.,* May 27, 1966; *Sentell* v. *Gibson,* 173 F. Supp. 737 (S.D. Ala. 1959); *Halliburton Oil Well Cementing Co.* v. *Stellman Trans. Co.,* 123 F. Supp. 568 (S.D. Tex. 1954); *The Lapwing,* 56 F.Supp. 859 (E.D. La. 1944).

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language is ambiguous and does not mean the captain meant the JUNO was in the Straits, but should be read to mean that if he proceeded forward, and thereafter encountered these currents, he could not make headway. This explanation might be accepted were it not for the fact that a statement which Captain Ives made shortly after arriving at Key West on January 21 reads in part as follows: "In the Yucatan Strait January 16, 1964, tug JUNO encountered gale force winds from SE . . . On January 18, 1964, . . . the rig was down by head so far that tug could not make headway against current in Yucatan Strait." Additionally, in his deposition taken November 25, 1965 (p. 25) in referring to the difficulties confronting the JUNO at 8:30 a.m. January 17 (when the list was detected), he states, "You couldn't go slower without going backwards with the current through the Yucatan. We were just about holding our own, and that was about all." Similar expressions as to his position in the Straits appear on pages 29 and 41 of the deposition.

From these authorities, the following principles are established:

(a) An agreement to tow does not impose the liability of an insurer, or of a common carrier, upon the tug;

(b) A contract of towage does not create a bailor-bailee relationship;

(c) An action by the tow against the tug is ex delicto, not ex contractu;

(d) The tow must prove negligence on the part of the tug to recover;

(e) No presumption of negligence arises merely on proof that the tow was in good condition when delivered, and in damaged condition when returned.

The libellant contends that negligence is shown here, not by direct evidence of what happened, but because (it is argued) that the circumstances here create a presumption of negligence — that damage of this nature is not inflicted across the leading edge of a steel plated barge unless there be negligence on the part of the tug — and that the burden is imposed on the tug to explain. In the absence of an explanation showing the tug to be free of fault, it is argued that liability follows. The libellant relies on *Detyens Shipyards, Inc.* v. *Marine Ind. Inc.*, 349 F. 2d 357 (4th Cir. 1965); *Bisso* v. *Waterways Trans. Co.*, 235 F. 2d 741 (5th Cir. 1956); *Sternberg Dredging Co.* v. *Moran Towing & Trans. Co.*, 196 F. 2d 1002 (2nd Cir. 1952), on reh. 200 F. 2d 603; *The Anaconda*, 164 F. 2d 224 (4th Cir. 1947); *Simkins* v. *Morrison & Sons*, 107 F. 2d 121 (5th Cir. 1939); *The Stirling Tomkins*, 56 F. 2d 740 (2nd Cir. 1932); *The Clarence P. Howland*, 15 F. 2d 25 (2nd Cir. 1926). These cases, I believe without exception, cite and recognize the rule of

Stevens v. *The White City* and her progeny, but announce the rule as contended for by libellant. The following quotation from *Bisso* v. *Waterways Trans. Co., supra,* is typical:

> "This brought into play the sensible rule that, even though the engagement is in contract so that the duty of the tug toward the tow is that of due care only, with the consequent burden on the tow of establishing negligence, [citing cases], a stranding which occurs under circumstances which ordinarily results in no such casualty puts on the tug the obligation of some satisfactory explanation. 'When an accident occurs to the tow the action is ex delicto and the burden is on the tow to show negligence on the part of the tug. However, circumstances may create a strong presumption of negligence. In that event the burden is on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence. . . .' " 235 F. 2d 741 at p. 744.

The other authorities cited by libellant contain similar statements.

I am not sure that the cases may all be reconciled; for while all those cited by libellant pay lip service to *Stevens* v. *The White City,* in a number of instances the courts base the finding of the tug's negligence on what seems to be rather nebulous and uncertain grounds. At any event, the question presented is whether the incident causing the damage is of such nature that it would not normally have happened had the tug exercised due care. In my judgment that is not the case here. In all probability the damage resulted from collision with one or more floating objects on the night of June 16-17. When it is borne in mind that the Barge was riding more than one-quarter mile behind the tug, that she was rolling in very rough seas, and that the damage apparently happened during the hours of darkness, I am of the view that such damage well might occur without knowledge of the tug's crew, though they be in the

exercise of due care, and keeping the most careful watch for her safety. The risk of striking a floating object (if, in fact, this caused the damage) is a peril of the sea, a risk which is borne by the tow [see, *Utah Home Fire Insurance Company* v. *Mechanical Equip. Co.*, 242 F. 2d 513 (5th Cir. 1957) and cases there cited; *New Orleans Coal, etc.* v. *U.S.*, 86 F. 2d 53 (5th Cir. 1936); *Sentell* v. *Gibson*, 173 F. Supp. 737 (S.D. Ala. 1959)], and from which a presumption of negligence does not arise. Hence the libellant has not shown fault on the part of the JUNO causing the initial damage to Barge 58.

The second prong of libellant's attack is better taken. The failure to take prompt action for relief of the Barge, after discovery of her difficulty, shows such a lack of judgment and skill on the part of the JUNO's officers as to render her liable for the damages which result therefrom. Respondent argues that one now has the benefit of hindsight; that the tug had heavy weather, rough seas, a miscalculation of her location, and a lack of communication to contend with; and that when faced with an emergency, the captain of the tug is only required to use his best judgment under the circumstances as they then appear, and that the tug is not to be cast in damages if subsequent events show that some other course might have been more advantageous. There is force in this argument. But much of the JUNO's difficulty was of her own making. She did not know her location because her electronic gear had gone out and was not repaired. She was unable to communicate with her owners, or those of the tow, or to receive weather information or other data during the critical period because her radio was inoperative; repaired, apparently with little effort, some few days later. Despite the fact that the condition of the Barge continued to worsen, the JUNO plowed ahead against adverse currents for a period of thirty hours rather than taking immediate advantage of a favoring current toward Key West. I do not credit the testimony of her master that

the seas were so rough that he could not effect the change of course which this would have called for. This conduct shows a callous indifference to the welfare of the tow and no doubt greatly increased the damages which she suffered, for which the tug may not escape responsibility. *Chemical Trans. Inc.* v. *M. Turecamo, Inc.* 290 F.2d 496 (2nd Cir. 1961); *Sternberg Dredging Co.* v. *Moran Towing Co., supra; The Joseph F. Clinton,* 250 F. 977 (2nd Cir. 1918).

Respondent replies to the charge of negligence by reliance on the exculpatory provisions of the Carriage of Goods by Sea Act incorporated by reference in the contract of towage as noted in the opening paragraphs hereof. The answer to this contention is the holding of *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85 (1955), wherein the Court states:

> "Viewed in the light of this history, we think *The Syracuse, The Wash Gray* and intervening lower court cases together strongly point to the existence of a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence. Because of this judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule." Id. at p. 90.

Respondent suggests that *Bisso* was wrongly decided, and that it will soon be overruled; and urges that it should be followed only in cases of inland towing, and where the evidence shows a lack of competition in the towing business. There is evidence here that there is much competition among the seagoing towers. But *Bisso* has been followed as recently as 1963 [*Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.,* 372 U.S. 697 (1963)] without qualification, and I decline the invitation to be the first to overrule it.

From the date of the filing of this libel, every contact between the proctors for the contesting parties has been marked by wholly unnecessary heat and friction. The fix-

ing of bond, production of witnesses for deposition, answers to interrogatories, all have necessitated application to the Court. The respondent has deliberately submitted an admittedly erroneous invoice for the deviation time. Proctor for the respondent states that he learned only on the day of trial that libellant admitted owing an additional amount on the towage fee and was withholding it as an offset — a fact with which the Court was familiar from the first in-chambers conference perhaps a year ago. Proctor for libellant has referred the Court to an accident report, intimating that it pertained to the accident in question, when in fact it related to an entirely different occurrence. Such conduct has not been of assistance to the Court in disposition of the case, and reflects no credit on the able and experienced proctors involved. Zeal in a client's behalf does not require this.

Libellant may recover for damages to the Barge 58 resulting from the delay in getting her to Key West. Respondent and cross-libellant may recover the amount admittedly withheld on the towing fee, and for the deviation calculated as though it had begun no later than noon on January 17. Recovery may not be had for deviation time incurred through fault of the tug. As the invoice on which cross-libellant sought to recover admittedly was false, attorneys fees are not allowed. The foregoing is adopted as Findings of Fact and Conclusions of Law.

Proctor for libellant will submit appropriate decree; will submit same to the proctor for respondent who will either approve it as to form or note thereon that he declines to approve it as to form, in which event he will advise the Court his objections in writing.

Done at Houston, Texas, this 10th day of June, 1966.

s/ BEN C. CONNALLY
United States District Judge

APPENDIX B

Report of the Special Commissioner and the District Court's Confirmation

THE OFFSHORE COMPANY, AS OWNER OF DRILL BARGE RIG 58,

Libellant,

vs.

G & H OFFSHORE TOWING CO., INC., AND THE TUG JUNO,

Respondents.

AND

G & H OFFSHORE TOWING CO., INC.,

Cross-Libellant,

vs.

THE OFFSHORE COMPANY,

Cross-Respondent.

United States District Court, Southern District of Texas, Houston Division,

March 3, 1967.

Commissioner's Report confirmed by the Court (CONNALLY, D. J.),

May 16, 1967.

In Admiralty — No. 64-H-88.

REPORT OF ED BLUESTEIN, JR.
SPECIAL COMMISSIONER ON DAMAGES.

TO THE HONORABLE COURT:

Pursuant to the Interlocutory Decree of the District Court dated July 28, 1966, referring to your Commissioner the assessment and computation of damages herein, a preliminary meeting with counsel was had on August 4, 1966. On

that date, a schedule was established for the exchange of exhibits, the submission of briefs, and the time for commencing the hearings. The formal hearings were on September 15, November 15, November 16, and November 22, 1966. A transcript of the proceedings with exhibits, has been filed with the clerk this date.

BACKGROUND FACTS.

The Offshore Company (Offshore hereafter), as owner of Drilling *Barge 58*, contracted with G. & H. Offshore Towing Co., Inc. (G. & H.) for the latter company's tug *Juno* to tow the unmanned barge from Beacon No. 7, off the coast of Morgan City, Louisiana, to Breighton, Trinidad.

The tow commenced on January 9, 1964. On the morning of January 17, the barge was observed "to be going down by the head." In mid-afternoon on January 18, the *Juno* altered course for Key West, Florida, as a port of refuge. The tug and tow arrived in Key West late on January 21, the barge still afloat, but with her bow under water.

The barge's hull consists of eight watertight compartments. The three compartments across the bow were found to have been punctured in various places by some unknown object or objects coming into violent contact with the hull during towage. Sea water flooded the three forward compartments, and extensive damage also was found to the electrical wiring and equipment in the barge's generator house on deck.

The barge was pumped out and minor repairs of a temporary nature were made in Key West to plug the holes. On January 23, the *Juno*, with the barge again in tow, departed Key West for Trinidad, arriving there on February 13, 1964. Extensive repairs to the barge were carried out in Trinidad, and the barge was ready for use on February 26.

It has been determined by the District Court (1) that G. & H. did not negligently cause or permit the hull of the Drilling *Barge 58* to become holed, but (2) that G. & H. should have deviated for Key West no later than noon on January 17 and was negligent in failing to do so.

The findings of the District Court are contained in its written opinion on liability dated June 10, 1966 A. M. C. 2172, 262 F. Supp. 282.

ISSUES.

As reflected by the opinion and interlocutory decree of the District Court, this action involves both claim and counterclaim. The damage issues may be stated as follows:

1. What damages, if any, resulted to The Offshore Company, as owner of Drilling *Barge 58*, from the negligence of the tug *Juno* in not deviating for Key West, Florida, at or before noon on January 17, 1964.

2. What sums, if any, is G. & H. Offshore Towing Co., Inc., entitled to receive as compensation (at the contract rate of $50.00 per hour plus Key West port charges) for the additional time, if any, that was required to complete the towage to Trinidad beyond the time such voyage would normally require as a result of the deviation into Key West, assuming for the purpose of calculating time, that such deviation commenced no later than noon January 17, 1964.

No issue exists on the right of G. & H. to recover from Offshore the unpaid balance of $19,375 due on the towage contract, which was admittedly withheld by Offshore as an offset against its claim for damages.

THE COUNTERCLAIM OF G. & H.

The latter of the two principal issues set out above is resolved more readily and will be treated first. It appears,

from the absence of any supporting proof, that G. & H. has abandoned its contractual claim for additional compensation based upon such added time as may have been required to complete the towage to Trinidad as a result of the deviation into Key West.

G. & H. called J. R. Bencal, a marine surveyor and consultant, and Capt. George Ives, master of the tug *Juno*, as its only witnesses. Neither gave any testimony which would support a finding that the deviation delayed the completion of the towage to Trindad.

The intended course of towage called for a voyage from Beacon No. 7 off the coast of Morgan City, Louisiana to Trinidad in the British West Indies by way of the Yucatan Straits, keeping to the west of Cuba. The tow deviated to Key West, Florida, before reaching the Yucatan Straits. After making temporary repairs to Drilling *Barge 58* at Key West, the voyage did not resume its original course, but instead proceeded around the east side of Cuba to reach Trinidad.

No estimates were given of the probable time that would have been spent to carry out this voyage as originally planned. The difficulty in making such an estimate is reflected by the sizeable errors in estimating the tow's actual position during the voyage by those in charge of its navigation (as noted in the opinion of the District Court). It is possible that the route taken after deviation did not result in any substantial additional towing time. At any rate, no basis exists for determining that additional time was required to complete the tow, and the burden of proof was on G. & H. to show such facts.

I find accordingly that G. & H. Offshore Towing Co., Inc., is not entitled to any compensation pursuant to the towage contract for additional time resulting from the deviation.

By deviating into Key West, certain port charges were incurred by G. & H. The parties, by their respective counsel, have stipulated that the expenses incurred by G. & H. in Key West amounted to $544.30, and that this amount was fair and reasonable and that the expenses were necessary. Offshore, in so stipulating, reserved its right to contest the necessity for the deviation itself. These expenses were primarily to pay the local pilots, the Key West harbormaster and wharfage costs. The negligence of G. & H. played no part in the necessity for incurring these expenses. I find that such expenses would have been required had G. & H. deviated to Key West no later than noon January 17, 1964.

Libellant suggests it would not have been necessary to deviate into Key West had the officers of the *Juno* not failed (quoting the District Court) "to take prompt action for relief of the barge after discovery of her difficulty." Under libellant's theory, they could have heaved to and used normal protective gear to cover or plug the ruptures in the barge hull, and then proceeded on course.

The District Court did not find the officers of the *Juno* negligent for failing to make temporary repairs in very rough seas, and I would decline to so find, if this reference to determine damages required my ruling on this question. As I read the District Court's opinion, the "prompt action" called for by prudent seamanship was an immediate deviation to the nearest port of refuge upon discovering the plight of Drilling *Barge 58*.

I accordingly find that G. & H. Offshore Towing Co., Inc., is entitled to recover the sum of $544.30 of and from The Offshore Company. Whether pre-judgment interest should be allowed to G. & H. on this recovery or on the recovery granted to G. & H. in the Interlocutory Decree for the bal-

ance of $19,375 due on the towage contract is left to the sound discretion of the District Court. No facts developed during the damage hearing would operate against awarding interest to G. & H. from the date the final payment under the towage contract became due. The conduct of G. & H. as developed during the trial on liability should also be weighed, and the District Court is in the best position to do so.

THE CLAIM OF THE OFFSHORE COMPANY.

Offshore contends that it has proved recoverable damages from G. & H. in the amount of $63,335.29, which may be categorized as follows:

1. Temporary repairs in Key West	$ 530.67
2. Repairs at Trinidad	20,804.62
3. Detention at Key West and Trinidad for 10 days at $4,200 per day	42,000.00
Total	$63,335.29

Libellant acknowledges that the hull plating damages, sustained in an unknown manner, are not recoverable under the holding of the District Court. For this reason, libellant makes no claim against G. & H. for the $711 expense of patching the forward end of the barge in Key West, though the amount was stipulated to be fair and reasonable, and the work necessary to repair the barge.

Libellant's position is that all damages to the equipment and machinery in the deck housing and on the main deck, and all detention damages, are recoverable from G. & H. Libellant does not concede that any portion of these damages would have occurred absent the negligent conduct of G. & H.

At the hearings, respondent objected to the admission of repair invoices, expense accounts, summaries of damages,

cost estimates, and related damage materials on the ground, among others, that no showing had been made by libellant that the damages were related to or connected with the negligence of respondent. Respondent also objected to much of the material as not being the best evidence, not shown to be reasonable in amount or necessary, and generally as "not properly proven up." All of libellant's exhibits were marked for identification and made a part of the record, although formal ruling on the admissibility of much of the materials was reserved. A review of the record, and the various exhibits, has been made, and respondent's objections, to the extent ruling thereon was previously reserved, are overruled. A relaxation of formal evidentiary rules is not uncommon in admiralty proceedings, and that approach seems appropriate here. Respondent's objections are considered to go more to the weight than the admissibility of the documents.

Respondent has noted that many of the Trinidad repair invoices on the barge were to Offshore Western, Inc., a wholly owned subsidiary of Offshore, and the evidence indicates Offshore Western, Inc., paid for these. This fact would not prevent Offshore from recovering these sums as damages to its barge. The bareboat charter of the barge from Offshore to Offshore Western, Inc. (Libellant's Exhibit No. 14) provides, in the sixth paragraph, that Offshore shall bear all costs incidental to any loss or damage to the barge not recoverable under insurance. These damages were below the insurance deductible feature on the barge and therefore were not recoverable by insurance. Offshore either has reimbursed Offshore Western for these expenses or is obligated to do so, and Offshore may assert these items against G. & H.

Admitting libellant's documentary exhibits into evidence is not to say that all or any part of the damages reflected

thereby are recoverable from G. & H. The issue is what portion of these damages, if any, was caused by the negligence of G. & H. Before proceeding to the difficult causation and burden of proof problems involved in answering this question, four of the repair or expense items listed on libellant's tabulation of damages (Libellant's Exhibit No. 13) are not considered to be properly included. These items either are not related to the on deck or deck house repair, or were not sufficiently established to permit their further consideration. The items are identified on the exhibit in the following manner:

A. Tarton Metal Co. ..... W. I. $ 83.55
Supplies ..... (U. S. $ 48.73)

B. Ships Service Generator and Distribution Switchboard build by U. S. Navy Dept.

Value prior to tow	$6,500.00	
Value after arrival	$2,000.00	
LOSS	$4,500.00	$4,500.00

C. Charge for crating, trucking, handling, shipping, etc.

II.	$ 8,722.92	
III.	276.76	
IV.	3,278.82	
	$12,278.50	
20%	2,455.70	$2,455.70

D. Labor to chip, scrape, paint, store room — *Jerome* — W.I. ..... $ 539.35
528.11
449.46
269.67

W.I.	$1,786.59	
U.S.	1,042.11	$1,042.11

The Tartan Metal Co. expense (Item A) was shown by the testimony of Henry Snyder, libellant's principal witness on the repairs made in Trinidad, to have been for metal to patch the barge "where the holes were knocked in it" in the leading edge. This type of damage was found by the District Court to have resulted from causes for which G. & H. may not be held responsible. The amount of $83.55 is in British West Indies currency. This is equivalent to $48.73 in United States currency, using the applicable conversion rate of .5833.

The claim of $4,500 for loss in value to the generator switchboard (Item B) before repairs must not be considered where, as here, the item is subsequently repaired. Repairs to the switchboard totalling $4,222.92 were made in Trinidad, as reflected on page two of Libellant's Exhibit No. 13. The item had a value of $6,500 before the tow began, and libellant lists $8,722.92 ($4,500 loss of value and $4,222.92 repairs) as the amount of damages to it. The proper measure of damages would be either the loss in value before repairs or the cost of repairs plus any loss of value after the repairs were completed. Mr. Snyder testified the switchboard was not in as good condition after being repaired as before the voyage, but his statement that it had depreciated "quite a bit" is too vague to permit the inclusion of any sum for loss of value after repairs.

The crating, trucking, handling and shipping charge of $2,455.70 (Item C) was an estimated expense figure based on twenty percent of the cost of goods acquired in the United States and shipped to Trinidad for use in repairing the barge. Mr. O'Kelley, who does cost estimating for libellant, testified that actual cash disbursements were made for crating, trucking, handling and shipping, but that accumulating and keeping these charges would be very difficult. He candidly stated that some supporting invoices were

actually thrown out, and the percent figure applied. While he believed the percent used to be fair and reasonable based upon general experience, he acknowledged that the actual cost might be five percent or forty percent or some other percent in this instance. Under these circumstances, this item is excluded from further consideration as not being properly established.

The last charge (Item D) which is rejected covers chipping and painting by Alfred Jerome. The figures are listed in British West Indies currency, but the conversion to U. S. currency is shown to total $1,042.11. This work went on below the main deck of the barge in storeroom areas located in the hull. Mr. W. L. Ellis, libellant's marine superintendent, examined the barge in Key West, and his testimony is accepted that no damage then existed below deck. Whatever the reason for this work, it may not be considered as a potential item for recovery, since the need for this work did not exist at Key West.

The four items discussed above amount to $8,046.54. Libellant's claim for repairs in Trinidad of $20,804.62 is reduced by that amount, leaving a balance of $12,758.08 to be considered. These expenses were necessary to repair the barge after the voyage, and were fair and reasonable in amount. Whether this sum is recoverable from G. & H. remains in issue.

No allowance for detention damages can be recommended. In order to recover detention damages, more than negligently caused delay must be shown. The claimant must prove a loss which resulted from the delay. The evidence does not establish such a loss.

Prior to the voyage in question, Drilling *Barge 58* lay idle for twelve to eighteen months, tied up near Morgan City, Louisiana. The barge was sent to Trinidad to Off-

shore Western, Inc., a wholly owned subsidiary of libellant, under a bareboat charter from Offshore to Offshore Western, Inc. The latter had a drilling contact with a Texaco subsidiary to drill an unspecified number of wells. This contract had no fixed commencement or termination date, and was subject to termination upon notice. The Texaco contract was not shown to have been prejudiced by the delay in commencing operations, nor were any subsequent contracts for the use of the barge shown to have been lost on account of delay. Stated otherwise, no showing was made that Drilling *Barge 58* lost employment by reason of the delay.

Additionally, the bareboat charter of the barge to Offshore Western, Inc. (Libellant's Exhibit No. 14), provided for a per day payment of $600 to libellant for the barge, with payments of an additional $1,000 per day for a drilling tender and a crewboat. The charter hire for the barge, according to the agreement, began January 9, 1964, the date on which the voyage began. No showing was made that this charter hire was not paid to Offshore for the period of time the barge was being repaired.

Mr. O'Kelley testified for libellant that $4,200 per day was the fair rental value of the drilling unit which included the barge, the drilling tender and the crewboat. He also testified that the actual daily profit for the drilling unit was $1,734. However, $4,200 is the amount Offshore Western, Inc., not libellant, received from Texaco under its contract, and $1,734 is the daily profit of Offshore Western, Inc., on the unit. Offshore Western, Inc., is not a party to this suit, and its detention damage, if any, is not recoverable by libellant.

If a proper method for determining the daily amount of detention damage has been overlooked, and if libellant is entitled to a recovery based upon such rate, I find the period

of time clearly attributable to the negligence of G. & H. to be approximately thirty-three hours. G. & H. negligently delayed twenty-seven hours before deviating for Key West (noon January 17 to 3:00 p.m. January 18), and I find that no more than six additional hours were required to reach Key West as a result of that delay. At noon on January 17 the tow was located approximately 265 miles southwest of Key West. When the tow changed course twenty-seven hours later, the distance to Key West was virtually unchanged. What little distance (approximately twenty-seven miles) the tow had made good during this period was to the southeast, and the relative distance to Key West remained the same. The added six hours which I have placed on the time required to get to Key West after the negligent delay in deviating is to compensate for the decrease in speed the tow could make after the barge settled completely to its maximum. At noon on January 17 the bow was down some three feet. By the time of deviating, the bow was awash.

In addition to the thirty-three hours delay at sea, I find the time spent in repairing the on deck and deck house equipment damage in Key West and Trinidad added six and one-half days to the time the barge otherwise would have been ready for use. The testimony showed the time to prepare a drilling barge for service after a routine voyage varied five to ten days. It took thirteen days in Trinidad to ready Drilling *Barge 58* for use on this occasion.

The question is now reached whether Offshore is entitled to recover from G. & H. for the on deck and deck house damages of $13,288.75 ($12,758.08 in Trinidad and $530.67 in Key West) which the evidence shows was sustained by libellant, and for the six and one-half days spent in repairing this damage, assuming a proper rate for detention.

Although Offshore is a wholly innocent party to the damages it has sustained and is deserving of every reasonable

consideration that can be given, I am unable to find a justifiable basis upon which Offshore may recover its damages from G. & H. in this cause. This conclusion is reached for two reasons. First, I am not convinced from a preponderance of the evidence that the negligence of G. & H. caused or was a substantial factor in bringing about the damages for which recovery is sought. Second, even if the negligence of G. & H. was a substantial factor in causing some damage to Offshore, no showing has been made of what portion of the damages were negligently caused by G. & H.

Not overlooked are the District Court's remarks, contained in its opinion on June 10, 1966, that the conduct of the *Juno* and its master in continuing ahead against adverse currents for thirty hours while the condition of the barge continued to worsen showed a "callous indifference to the welfare of the tow and no doubt increased the damage which she suffered, for which the tug may not escape responsibility." These remarks are not construed to constitute a specific finding by the District Court that the negligence of the *Juno* did in fact cause additional damages to the barge. In the context used the remarks are taken to mean only that the District Court believed that in all probability the evidence on damages would show this conduct increased the damages. The Interlocutory Decree appears to have left the causation question on damages entirely open when it states that Offshore shall recover "the damages, *if any,* resulting from the delay after noon on January 17, 1964, in getting the barge to Key West."

The electrical and mechanical equipment in the generator house was protected from exposure to salt water so long as the barge remained in good trim with eight feet of freeboard, as it was prior to being holed. With the barge originally trimmed slightly down by the stern, water entering or forming in the generator house could drain out the one-half inch limber hole at deck level on the generator

house after door. Actually, except for this drain hole, the house was watertight. Once the barge's trim changed from slightly down by the stern to radically down by the bow, the limber hole lost its drainage utility and became instead the opening through which the damaging salt water entered the generator house to contaminate the contents. By noon on January 17, with the bow down some three feet, and seas breaking over the deck, the contamination had begun.

When the generator house door was opened in Key West, salt water stood at an average depth of eight and one-half inches. Moisture covered the overhead in droplets and the bulkheads were heavily sweating. The polyethelene protective wrapping on the equipment was soaking wet. The electrical and mechanical equipment within the house was badly splashed with salt water, and also was damaged from the heavy sweating.

I have concluded that the generator house probably would have contained no less water upon arrival in Key West, and that the electrical and mechanical equipment therein would have been wetted to an equal extent by salt water and sweat had the *Juno* altered course for Key West no later than noon on January 17. The time to bring the tow in to Key West after deviating was eighty one hours, and the barge's bow was awash the entire time. According to my calculations, deviating at noon on January 17 would still have subjected the barge to being towed with bow awash for forty-eight hours, with her trim radically and adversely altered for the entire distance to Key West. I estimate this trip would have taken seventy-five hours to complete (six hours less e to initially decreased drag), and the first twenty-seven hours would have seen the barge's bow settle until it was awash.

It is possible that the delay caused considerable additional damage to the barge. On the other hand, it also is

possible that the equipment and material on the barge would have required the same amount of repair or replacement even had there been no negligent delay in reaching Key West. No testimony or proof was offered, either from experts, or others, upon which findings could reasonably be based. Whether the delay added to the barge damage, or to what extent, are questions which cannot be answered from the evidence without resort to guesswork.

I believe that Offshore had the burden to establish with reasonable certainty the damages caused by the negligent conduct of G. & H. No recovery of damages may be based upon conjecture or speculation.

If there were credible testimony in the record that the delay in all probability substantially increased the damages, a recovery by Offshore would not be withheld because no exact or precise computation could be made of the increased amount. It would suffice that some reasonably reliable basis was shown upon which an apportionment could be made. Moreover, recovery should not be withheld under circumstances where the damages caused by a negligent party cannot be separated or apportioned, for to do so would penalize the innocent party to the relief of the guilty one.

This record, however, lacks evidence to establish (1) that the negligence of G. & H. caused additional damages, (2) what portion of the total damages was due to the negligence of G. & H., or (3) that the damages negeligently caused by G. & H. were not capable of being reasonably apportioned from the total. Offshore's burden initially was to establish (1) above. It did not do so. However, even if this fact is considered established, I believe Offshore had the additional burden of proving either (2) or (3) above. Finding no evidence in the record upon which either proposition can be supported, Offshore must be denied a recovery for

any damage to the barge, or for any portion of the six and one-half days attributable to repairing this damage.

The questions of causation and burden of proof discussed herein have not been easily answered. If applicable rules have been overlooked or improperly applied or findings erroneously made, the findings on the amount of damages sustained should permit a final determination on review without the necessity for further proof being taken.

Interest on Libellant's Claim.

Since Offshore is not entitled to a recovery, no finding on interest is required. However, should Offshore be found entitled to recover damages from G. & H. arising from this casualty, I would award interest at six percent on such recovery from January 17, 1964.

Costs.

I do not consider the taxation of costs to be within the scope of this reference on damages, and any ruling thereon is left for the District Court to determine as it deems appropriate. Counsel agreed at the outset of the damage hearings that the cost for the original and two copies of the transcript of the damage hearings would be taxable as costs.

Filing.

This report is filed with the clerk of the Court this 3rd day of March, 1967. Prior to the filing of the report, a draft thereof was submitted to counsel for both parties for the purpose of receiving their suggestions, in accordance with F. R. C. P. Rule 53(e)(5). The suggestions received

have been duly considered, and such revisions made as were considered appropriate.

United States District Court, Southern District of Texas,
Houston Division,

May 16, 1967.

In Admiralty — No. 64-H-88.

Vinson, Elkins, Weems & Searls
(Robert M. Julian, of Counsel),
Attorneys for Libellant.

Royston, Rayzor & Cook
(M. L. Cook, of Counsel),
Attorneys for Respondent.

ON MOTION TO CONFIRM — AND EXCEPTIONS TO —
THE REPORT OF THE SPECIAL COMMISSIONER

BEN C. CONNALLY, D. J.:

Following the filing of memorandum opinion herein June 10, 1966, this matter was referred to ED BLUESTEIN, JR., Esq., a member of the bar of this Court, as Special Commissioner to determine the damages. After hearing, such Special Commissioner on March 3, 1967, filed his report. It is largely in favor of the respondent and cross-libellant G. & H. Thus G. & H. has moved to confirm the report, and Offshore urges a number of exceptions thereto. By reason thereof, and further by reason of the fact that other issues as to damage remain undecided, I make the following rulings.

Such report notes that G. & H. has abandoned its contractual claim for additional compensation based on the added time required to complete the towage to Trinidad as result of the deviation into Key West. Such being the case, the action of the Commissioner in denying recovery is clearly right.

With respect to port charges of $544.30 incurred by G. & H. at Key West, I am of the view that they were properly chargeable under the contract with Offshore and that recovery should be allowed therefor, with interest from the date that they were paid until the date of judgment.

With respect to the claim of Offshore, the principal items are its claim for detention at the rate of $4,200.00 per day for a period of ten days, and its cost of repairs to the barge. With respect to the former, I am of the view that the Special Commissioner was clearly right in disallowing this item in the absence of any proof that the barge lost any employment or that its drilling contract at Trinidad was in anywise adversely affected by the delay.

The principal question is that of the cost of the repairs. As is evident from an examination of the memorandum opinion of this Court of June 10, 1966, I was then of the view that the evidence on damages likely would show that the continued exposure of the barge to the salt water which had intruded both in her forward compartments and in her deckhouse had increased the damage, and occasioned additional repairs, which would not have been necessary had prompt action been taken for her relief. It appears, however, that there is substantial evidence which the Special Commissioner has credited that such was not the case; and that large quantities of salt water entered the deckhouse when the barge first began going down by the head. The findings that the damage was not increased by the delay

of the *Juno* in heading for a port of refuge finds ample support in the evidence.

There is admittedly due from *Offshore* to G. & H. the sum of $19,375.00 withheld on the towage contract, by way of anticipated set-off. G. & H. is entitled to recover this sum. As the amount is liquidated and became due at the the time of the towage, interest at the rate of 6% is allowed from that date to the date of decree.

G. & H. seeks to recover its attorneys' fees in this proceeding, and points to a provision in its written contract of towage providing essentially that court costs and attorneys' fees shall be added to its recovery where it recovers its towage charges after suit filed. Thus, this provision applies only to the cross-libel. Offshore's obligation and ability to pay the $19,375.00 has not been in controversy. The only contest here has been with respect to the libel of Offshore charging the *Juno* with fault in connection with the towing. I do not consider that G. & H. is entitled to attorneys' fees, and recovery of this item is denied.

The report of the Special Commissioner is confirmed. He has carefully analyzed and considered the issues presented, and the evidence. A fee for the Special Commissioner in the amount of $3,000.00 is fixed, and taxed as costs. Costs of court are taxed against the libellant. Proctor for G. & H. will prepare appropriate decree and forward same to proctor for Offshore for approval as to form. He will either approve or disapprove, in which latter event he will advise the Court in writing of his objections to the form of the decree.

APPENDIX C

Opinion and Judgment of the Court of Appeals for the Fifth Circuit

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 25095

THE OFFSHORE COMPANY,
Appellant-Appellee,

versus

G & H OFFSHORE TOWING COMPANY, INC.,
(AND REVERSE TITLE)
Appellee-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(November 27, 1968)

Before GOLDBERG and CLAYTON,* Circuit Judges, and NOEL, District Judge.

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* Judge Clayton, the third judge constituting the court, participated in the hearing and the decision of this case. The present opinion is rendered by a quorum of the court pursuant to 28 U.S.C.A. § 46, Judge Clayton having taken no part in the final draft of this opinion.

PER CURIAM: The facts out of which this admiralty action arises and the reasons assigned by the district court for its decision are set forth in its opinion and its confirmation of the report of the special commissioner on damages. *The Offshore Company* v. *G & H Offshore Towing Company, Inc.*, ... F.Supp. ..... (S.D. Tex. 1968); also at 1966 AMC 2172 and 1967 AMC 1597. After thoroughly scrutinizing the record as a whole, we agree that the findings of the district court are not clearly erroneous, *B & M Towing Co.* v. *Wittliff*, 258 F.2d 473 (5th Cir. 1958), and that the authorities cited therein were governing and correctly applied. Our views being those of the district court, the judgments rendered by the district court are

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1967

No. 25095

D. C. Docket No. Adm. 64-H-88

THE OFFSHORE COMPANY,

Appellant-Appellee,

versus

G & H OFFSHORE TOWING COMPANY, INC.,
(AND REVERSE TITLE)

Appellee-Appellant.

Appeals from the United States District Court for the Southern District of Texas

Before GOLDBERG and CLAYTON*, Circuit Judges, and NOEL, District Judge.

November 27, 1968

* Judge Clayton, the third judge constituting the Court, participated in the hearing and the decision of this case. The present opinion is rendered by a quorum of the court pursuant to 28 U.S.C.A. § 46, Judge Clayton having taken no part in the final draft of this opinion.

Issued as Mandate: December 19, 1960.
Recoverable Costs:

Cost of Printing Brief of Appellee	$146.88
Attorney's Docket Fee Due Messrs. Royston, Rayzor & Cook	$100.00
Total	$246.88

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, The Offshore Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX D

Proposed Interlocutory Decree

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE OFFSHORE COMPANY,
as owner of Drill Barge Rig 58,
Libelant,

v.

G & H OFFSHORE TOWING CO., INC.,
and the Tug "JUNO",
Respondents.

G & H OFFSHORE TOWING CO., INC.,
Cross-Libelant,

v.

THE OFFSHORE COMPANY,
Cross-Respondent.

ADMIRALTY NO. 64-H-

INTERLOCUTORY DEC

The above entitled cause and cross-cause having duly come on for trial on the 14th day of March, 1966, and Vinson, Elkins, Weems & Searls, by Robert M. Julian, having appeared for libelant (and cross-respondent), THE OFFSHORE COMPANY, and Royston, Rayzor & Cook, by M. L. Cook, having appeared for respondents, G & H Offshore Towing Co., Inc. and the tug JUNO (and for

cross-libelant, G & H Offshore Towing Co., Inc.), and said cause and cross-cause having been heard upon the pleadings and proofs of the respective parties, and the Court, after due deliberation, having filed its written opinion on the 10th day of June, 1966, setting forth its Findings of Fact and Conclusions of Law and directing that libelant recover from respondents the damage to Barge 58 or losses that resulted from the events that took place after the Barge was holed on or about January 17, 1964, in connection with respondents' delay in getting her to a port of refuge at Key West, Florida, after said Barge 58 was known by respondents to be down by her head and in need of assistance; and with respect to the cross-libel directing that G & H Offshore Towing Co., Inc. recover the unpaid balance due on the towage contract which was being withheld by The Offshore Company as an offset against its damages, together with whatever additional compensation that arose from the additional time, if any, required by the tug JUNO to complete the agreed towage which would result from the deviation of the tug JUNO to Key West if calculated on the basis that such deviation had commenced no later than noon on January 17, 1964, and had been completed without fault or delay on the part of the tug; NOW, THEREFORE, it is

ORDERED, ADJUDGED and DECREED that libelant, The Offshore Company, as owner of the Drill Barge Rig 58, recover of and from respondents, G & H Offshore Towing Co., Inc. and the tug JUNO whatever damages or losses it sustained that resulted from the events that took place after Barge 58 was holded on or about January 17, 1964, in connection with respondents' delay in getting her to a port of refuge at Key West, Florida, and after said barge was known by said respondents to be down by her head and in need of assistance, together with costs of court and inter-

est at six per cent (6%) per annum (after applying all offsets hereinafter mentioned to which respondents and cross-libelant may be lawfully entitled) from January 17, 1964, until paid; and

IT IS FURTHER ORDERED that the unpaid balance of Nineteen Thousand Three Hundred Seventy-five and no/100 Dollars ($19,375.00) due on the towage contract which is being withheld by The Offshore Company as an offset to damages to its Barge 58 as aforesaid shall be recovered by G & H Offshore Towing Co., Inc. pursuant to towage contract between the parties dated December 9, 1963, but shall be applied in payment of whatever damages are awarded to The Offshore Company pursuant to this decree, and G & H Offshore Towing Co., Inc. is further entitled to be compensated at the rate of $50.00 per hour plus Key West port charges pursuant to paragraph 6 of the said contract between the parties dated December 9, 1963, as compensation for the additional time, if any, that was required to complete the towage to Trinidad beyond the time such voyage would normally require as a result of the deviation into Key West, assuming for the purpose of calculating time, that such deviation commenced no later than noon January 17, 1964, and was completed in due course without fault or delay on the part of the tug, and such payment for additional towage and port charges shall also be applied as an offset to the losses sustained by The Offshore Company.

If the losses of The Offshore Company do not exceed the above mentioned amounts payable to G & H Offshore Towing Co., Inc., namely, the $19,375.00 due on the towage contract plus costs of putting into Key West, then G & H Offshore Towing Co., Inc. shall recover the excess from The Offshore Company.

IT IS FURTHER ORDERED that in the event the parties hereto cannot agree among themselves as to the quantum of damages they have sustained, the Court shall, upon application by either party upon notice to the other, appoint a special commissioner to ascertain and compute said damages and to report thereon to this Court.

Done at Houston, Texas, this ..... day of June, 1966.

.....
United States District Judge.

APPROVED AS TO FORM:
VINSON, ELKINS, WEEMS & SEARLS

By.....

Robert M. Julian

Proctors for libelant (and cross-respondent) The Offshore Company
First City National Bank Building
Houston, Texas

ROYSTON, RAYZOR & COOK
M. L. Cook

By.....

Proctors for respondents (and cross-libelant) G & H Offshore Towing Co., Inc. and the tug JUNO
877 San Jacinto Building
Houston, Texas

APPENDIX E

Interlocutory Decree

[294]

INTERLOCUTORY DECREE.

Filed Jul. 28, 1966.

In the United States District Court for the Southern District of Texas, Houston Division.

The Offshore Company, As Owner of Drill Barge Rig 58, Libelant,

vs.

G & H Offshore Towing Co., Inc., and the Tug Juno, Respondents,

G & H Offshore Towing Co., Inc., Cross-Libelant,

vs.

The Offshore Company, Cross-Respondent.

Admiralty No. 64-H-88.

The above entitled cause and cross-cause having duly come on for trial on the 14th day of March, 1966, and Vinson, Elkins, Weems & Searls, by Robert M. Julian, having appeared for libelant (and cross-respondent), The Offshore Company, and Royston, Rayzor & Cook, by M. L. Cook, having appeared for respondents G & H Offshore Towing Co., Inc. and the Tug Juno (and for cross-libelant, G & H Offshore Towing Co., Inc.), and said cause and cross-cause having been heard upon the pleadings and proofs of the respective parties, and the Court, after due delibera-

tion, having filed its written opinion on the 10th day of June, 1966, setting forth its Findings of Fact and Conclusions of Law and directing that libelant recover from respondents the damage to Barge 58 resulting from the delay in getting the barge to Key West, Florida; and, with respect to the cross-libel, **[295]** directing that G & H Offshore Towing Co., Inc. recover the unpaid balance due on the towage contract, together with whatever additional compensation arose from the additional time, if any, required by the Tug Juno to complete the agreed towage which would result from the deviation of the Tug Juno to Key West if calculated on the basis that such deviation had commenced no later than noon on January 17, 1964; Now, Therefore, it is

Ordered, Adjudged and Decreed that libelant, The Offshore Company, as owner of the Drill Barge Rig 58, recover of and from respondents, G & H Offshore Towing Co., Inc. and the Tug June, the damages, if any, resulting from the delay after noon on January 17, 1964, in getting the barge to Key West, and

It Is Further Ordered that cross-libellant, G & H Offshore Towing Co., Inc., recover from The Offshore Company the unpaid balance of Nineteen Thousand Three Hundred Seventy-five and No/100 Dollars ($19,375.00) due on the towage contract, and G & H Offshore Towing Co., Inc. is further entitled to be compensated at the rate of $50.00 per hour plus Key West port charges pursuant to paragraph 6 of the said contract between the parties dated December 9, 1963, as compensation for the additional time, if any, that was required to complete the towage to Trinidad beyond the time such voyage would normally require as a result of the deviation into Key West, assuming for the purposes of calculating time, that such deviation commenced no later than noon January 17, 1964.

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It Is Further Ordered that the assessment and/or computation of the amounts due the respective parties hereto is referred to Ed Bluestein, Esq., Special Commissioner, who will take proof and report to the Court with convenient speed.

Done at Houston, Texas, this 28th day of July, 1966.

BEN C. CONNALLY,
United States District Judge.

Approved as to Form:

VINSON, ELKINS, WEEMS & SEARLS

By ROBERT M. JULIAN

(Robert M. Julian)
Proctors for Libelant(and Cross-Respondent), The Offshore Company.

First City National Bank Building
Houston, Texas 77002.

ROYSTON, RAYZOR & COOK,

By M. L. Cook,

(M. L. Cook),
Proctors for Respondents (and Cross-Libelant) G & H Offshore Towing Co., Inc. and the Tug Juno.

877 San Jacinto Building,
Houston, Texas 77002.

APPENDIX F

Corps of Engineers' publication, "Mississippi River Navigation," 1968 pp. 56

River Commerce

During World War II, Mississippi River transportation assumed an even more important role than ever before. The principal commerce on the lower Mississippi River consisted of the upstream movement of gasoline, oil, sulphur, and other products and materials vital to the war effort. In addition, 3,943 Army and Navy craft and other vessels for use in the war — destroyer escorts, fleet submarines, landing craft, freighters, tankers, and oceangoing tugs — moved from inland shipyards down the Mississippi to the sea.

In the ten years between 1956 and 1966, commerce on the Mississippi River between Minneapolis and the Gulf increased 86 percent; between St. Louis and Cairo, 103 percent; between Cairo and Baton Rouge, 108 percent; between Cairo and the Gulf, 92 percent; between Baton Rouge and New Orleans, 101 percent; and between New Orleans and the Gulf, 89 percent.

For the Mississippi River from Minneapolis to the Gulf of Mexico, a total of 193,950,405 tons was moved in 1966, representing 67,794,510,119 ton-miles, the equivalent of the transportation of one ton of freight around the earth at the equator about 2,722,452 times.

Tonnage for 1966 on the Mississippi River between St. Louis and Cairo was 46,398,038. The tonnage carried between Cario and Baton Rouge was 66,189,233, and between Cairo and the Gulf, it was 168,232,182. Between Baton Rouge and New Orleans 91,516,328 tons were moved in

1966; for the same year, 125,589,283 tons were transported between New Orleans and the Gulf.

Without question the Nation's principal river, the Mississippi is the main stem of a network of inland navigable waterways which form a system of about 12,350 miles in length, not including the connecting Gulf Intracoastal Waterway (of 1,173 miles) and its connecting inland and Gulf Coast streams. This giant waterways system includes the Ohio, Missouri, Illinois, Cumberland, and Tennessee Rivers, among others. It extends into the agricultural midwest, the industrial east, making Memphis, Vicksburg and New Orleans close neighbors of Pittsburgh, Kansas City, and Chicago. The importance of this may be realized when it is understood that, in 1966, the system supported traffic involving 321,756,407 tons and 106,375,962,417 ton-miles.

Heavy commercial traffic included grains, coal and coke, petroleum products, non-metallic minerals, metal products of all types, building materials, sand and gravel, salt, sulphur, and chemicals, among others. In addition to this traffic, many pleasure craft from all parts of the country now use the Mississippi River for vacation and travel.

Contributions to Development

The rapid growth in river traffic may be traced to many interdependent factors. One of the most important is the great improvement in the towboats and barges themselves. Carefully conducted research projects and much prototype experimentation have accounted for significant developments in transportation methods. Modern steel barges have a capacity of three or four times that of one packet boat. The average modern steam or Diesel towboats may push as many as twenty 1,000-ton steel barges at one time.

Integrated tows, developed several years ago, are becoming more and more numerous on the Mississippi. Made up of a bowpiece, a number of square-end barges, and a towboat, the entire unit is lashed together to form one streamlined vessel. The integrated tows vary in size, but one of the largest is nearly 1,200 feet long — longer than the largest ocean liner afloat. This tow often carries 200,000 barrels (35,000 tons) of petroleum products.

Towboats have become larger and much higher powered. For example, in the recent past the average towboat had about 500 horsepower. Today, the average is about 3,000 horsepower, with several towboats operating with more than 6,000 horsepower. The commercial towboat UNITED STATES is a 180-foot vessel which has four diesel engines and can develop 8,500 horsepower. The 9,000-horsepower, quadruple-screw M/V AMERICA, put into operation in 1960, has been declared the world's most powerful towboat. These sister ships are used primarily on the Mississippi River between St. Louis and New Orleans. On April 1962, the UNITED STATES moved a downbound tow of 52 barges carrying 43,000 tons of cargo. This tow was 245 feet wide, 1500 feet long overall, and covered an area of more than 7 acres, breaking a portion of the 1907 record set by the Steamer SPRAGUE, of 70,000 tons covering 6½ acres.

Equipped with Kort nozzles, contraguide rudders, and other modern marine equipment, today's towboats are powerful, efficient and fast.

Barges, too, have undergone radical changes. The standard barge for dry cargo is about 195 feet long and 35 feet wide; the liquid barge is usually about 295 feet long and 50 feet wide. These are designed to draft about 9 feet with a cargo capacity of about 1,500 tons for smaller barges and 2,500 tons for liquid cargo barges. In addition to increases

in size and carrying capacity, barges have been designed to carry specialized cargoes, such as crude pine gum, molten sulphur, asphalt, cement, chemicals, liquefied petroleum gas, and cattle.

Improved harbor and terminal facilities have also made enormous contributions to the growth in inland waterways traffic. Many port cities in the Mississippi Valley have constructed, or are building, modern river-rail-truck terminals, storage facilities, warehouses, and other improvements designed to accommodate the shipment of materials by water.